



## University of Arkansas at Little Rock Law Review

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Volume 29

Issue 1 *The Ben J. Altheimer Symposium: A  
Reporter's Privilege: Legal Fact or Fiction*

Article 1

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2006

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#### Recommended Citation

Philip S. Anderson, *The Reporter's Privilege in Arkansas: An Overview with Commentary*, 29 U. ARK. LITTLE ROCK L. REV. 1 (2006).

Available at: <https://lawrepository.ualr.edu/lawreview/vol29/iss1/1>

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# THE REPORTER'S PRIVILEGE IN ARKANSAS: AN OVERVIEW WITH COMMENTARY

*Philip S. Anderson\**

## I. INTRODUCTION

Looming over any discussion of the reporter's privilege is *Branzburg v. Hayes*,<sup>1</sup> a 1972 opinion of the United States Supreme Court. That decision involved three cases in which journalists who were or may have been eyewitnesses to criminal activity refused to appear and testify before grand juries about what they heard and saw.<sup>2</sup> *Branzburg* was a five to four decision, and the jurisprudence that has developed since it was issued has been influenced by the concurring opinion of Justice Lewis Powell, the swing vote on the Court, and by the robust dissenting opinion of Justice Potter Stewart.<sup>3</sup> The majority opinion by Justice Byron White held that the freedom of speech and press guaranteed by the First Amendment was not abridged by requiring the newsmen to appear and testify before state and federal grand juries.<sup>4</sup> In two of the cases, the newsmen wrote about criminal activity that they had witnessed,<sup>5</sup> and in the third case, the newsman may have witnessed or heard about criminal activity but had not written about it.<sup>6</sup>

This article will (1) review the Arkansas Shield Statute and the two cases construing it,<sup>7</sup> (2) consider the legacy of *Branzburg* and the impact of a recent case that challenges the reading given to the opinion during the past thirty-two years by federal and state appellate courts,<sup>8</sup> and (3) review decisions of state and federal courts of original jurisdiction in Arkansas on the issue of a reporter's privilege.<sup>9</sup> All of this will lead to the conclusion that the

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\* Member, Williams & Anderson, PLC, Little Rock; president, American Bar Association, 1998–1999. The author gratefully acknowledges the assistance of Bonnie Johnson, also of Williams & Anderson, in preparing this article for publication, as well as the valuable contributions of student clerks Joi Leonard of the William H. Bowen School of Law, University of Arkansas at Little Rock, and T.J. Fowler of the School of Law, University of Arkansas, Fayetteville.

1. 408 U.S. 665 (1972).

2. *Id.* at 667–79.

3. Justice William O. Douglas filed a separate dissenting opinion in favor of an absolute privilege. *United States v. Caldwell*, 408 U.S. 665, 712 (1972) (Douglas, J., dissenting).

4. *Branzburg*, 408 U.S. at 691.

5. *Id.* at 667–75.

6. *Id.* at 675.

7. *See infra* Part II.

8. *See infra* Part III.

9. *See infra* Part IV.

majority of state and federal decisions in the United States since the *Branzburg* decision got it right. There is a constitutional concept broader than the protection of reporters that is at stake. It is the protection of the public.<sup>10</sup>

## II. THE ARKANSAS SHIELD STATUTE

*Branzburg* was concerned only with grand jury subpoenas in criminal cases.<sup>11</sup> In Arkansas, however, there is a reporter's shield statute that affords protection in both criminal and civil proceedings.<sup>12</sup> That statute does not apply in federal-question proceedings.<sup>13</sup> The Arkansas Supreme Court has recognized the privilege that the shield statute affords to journalists.<sup>14</sup>

The Arkansas Shield Statute was adopted in 1936 as part of a package of criminal reform provisions in an initiated act sponsored by the Arkansas Bar Association.<sup>15</sup> The statute reads as follows:

Before any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical or manager or owner of any radio station shall be required to disclose to any grand jury or to any other authority the source of information used as the basis for any article he may have written, published, or broadcast, it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interests of the public welfare.<sup>16</sup>

The statute has been amended only once, in 1949, to add references to radio.<sup>17</sup>

There have been only two reported opinions construing the shield statute.<sup>18</sup> The first was a 1978 opinion of the Arkansas Supreme Court, *Saxton v. Arkansas Gazette Co.*<sup>19</sup> It was a libel suit against the newspaper and its reporter.<sup>20</sup> During the course of discovery, the plaintiff sought to determine

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10. See *infra* Part V.

11. *Branzburg*, 408 U.S. at 667.

12. ARK. CODE ANN. § 16-85-510 (West 2004).

13. *United States v. Hively*, 202 F. Supp. 2d 886 (E.D. Ark. 2002); *In re Grand Jury Subpoena Am. Broad. Co.*, 947 F. Supp. 1314, 1321 (E.D. Ark. 1996).

14. *Saxton v. Ark. Gazette Co.*, 264 Ark. 133, 569 S.W.2d 115 (1978).

15. The origins of this statute are described in detail in a magisterial article by Professor John J. Watkins entitled *The Journalist's Privilege in Arkansas*, 7 U. ARK. LITTLE ROCK L.J. 473 (1984).

16. ARK. CODE ANN. § 16-85-510 (West 2004).

17. Act of Mar. 8, 1949, No. 254, 1949 Ark. Acts 761 (codified at ARK. CODE ANN. § 16-85-510 (West 2004)).

18. *Williams v. Am. Broad. Co.*, 96 F.R.D. 658 (W.D. Ark. 1983); *Saxton*, 264 Ark. 133, 569 S.W.2d 115.

19. 264 Ark. 133, 569 S.W.2d 115 (1978).

20. *Id.* at 134, 569 S.W.2d at 116.

the identity of the source of information appearing in articles written by the reporter and published in the newspaper.<sup>21</sup> The reporter refused to reveal her source and claimed the reporter's privilege.<sup>22</sup> The plaintiff moved to compel discovery, and the trial court found that the plaintiff "had not made reasonable efforts by deposition or other means to learn the identity of the informant nor reasonable efforts to show publication with malice, bad faith, and reckless disregard" of whether the publications were false or not.<sup>23</sup> The court also held that disclosure of the source was privileged pursuant to the shield statute.<sup>24</sup> The newspaper and reporter moved for summary judgment, which was granted in the absence of any further proof by the plaintiff.<sup>25</sup>

On appeal, the plaintiff cited *Branzburg v. Hayes* for reversal.<sup>26</sup> The Arkansas Supreme Court distinguished *Branzburg* and other cases cited by the plaintiff because they all involved the assertion that a reporter has an absolute privilege under the First Amendment, and those cases did not involve a statutory privilege for news reporters.<sup>27</sup> The court held that, even though the shield statute had been codified with criminal statutes, it also applied to civil cases.<sup>28</sup> The court further held that the reporter did not waive whatever privilege she had by telling her editor and the deputy prosecuting attorney the name of the person she thought to be her anonymous source.<sup>29</sup> Even though *Saxton* is the only Arkansas Supreme Court case citing the statute, it resolved important issues regarding its reach and application.<sup>30</sup>

In a 1978 opinion from the United States District Court for the Western District of Arkansas, *Williams v. American Broadcasting Co.*,<sup>31</sup> Judge Franklin Waters held that the shield statute did not protect outtakes (the unused footage of edited videotaped reports).<sup>32</sup> The court, while acknowledging that the Arkansas Supreme Court had been "zealous in the protection of

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21. *Id.*, 569 S.W.2d at 116.

22. *Id.*, 569 S.W.2d at 116.

23. *Id.*, 569 S.W.2d at 116.

24. *Id.*, 569 S.W.2d at 116.

25. *Saxton*, 264 Ark. at 134, 569 S.W.2d at 116.

26. *Id.* at 135, 569 S.W.2d at 116.

27. *Id.*, 569 S.W.2d at 116.

28. *Id.* at 136, 569 S.W.2d at 117.

29. *Id.*, 569 S.W.2d at 117.

30. Judge George Howard, Jr., now an active United States District Judge, was a justice of the Arkansas Supreme Court at the time of the *Saxton* opinion, and he wrote a concurring opinion stating that he based his vote to affirm "on the belief that the First and Fourteenth Amendments to the United States Constitution afford a greater protection to the press and citizens to criticize and comment freely on the manner in which public officials perform their public stewardship." *Id.* at 140, 569 S.W.2d at 119 (Howard, J., concurring). He also said that it was his view "that the privilege to criticize public officials' conduct, despite the possible harm that might develop, is unconditional and absolute." *Id.*, 569 S.W.2d at 119.

31. 96 F.R.D. 658 (W.D. Ark. 1983).

32. *Id.* at 665.

the rights of the press,"<sup>33</sup> held that Arkansas law required a strict construction of the statute because it was at variance with the common law.<sup>34</sup> Therefore, the court held that the plain wording of the statute protected only the "source of information" and did not extend to outtakes.<sup>35</sup> After invoking the principle of strict construction for this statute, the court also found that the shield statute applied to television journalists in spite of the fact that the statute mentions only newspapers, periodicals, and radio stations, and the Arkansas General Assembly had not seen fit to add the medium of television to the statute during the thirty-four years following the amendment to add radio journalists to its coverage.<sup>36</sup> That ruling can be justified, but not under the rubric of strict construction.

The court's finding that references in the statute to radio stations permitted the court to construe the statute to apply to television stations is a liberal construction by any measure. Having referred to the Arkansas Supreme Court's zeal "in the protection of the rights of the press,"<sup>37</sup> the court was justified in applying a liberal construction to the statute's language. Also, the Arkansas Freedom of Information Act,<sup>38</sup> which codifies a concept not recognized by the common law, is given a liberal interpretation by the Arkansas Supreme Court in order to achieve the beneficial public purposes that the Act was designed to accomplish.<sup>39</sup> That is a remedial statute, of course, but so is the shield statute, and it is entitled to a liberal construction to achieve its purposes, too.

### III. *BRANZBURG* AND THE COURTS

The Supreme Court's decision in *Branzburg* did not go beyond the issue of whether the guarantees of freedom of speech and press in the First Amendment permit a journalist to decline to appear and testify before a grand jury in a criminal proceeding.<sup>40</sup> The Court held that they do not.<sup>41</sup> Justice Powell, the swing vote, in a concurring opinion, pointedly expressed what the majority opinion did *not* do.<sup>42</sup> He wrote:

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33. *Id.* (citing *Pritchard v. Times Sw. Broad.*, 277 Ark. 458, 642 S.W.2d 877 (1982)).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Williams*, 96 F.R.D. at 665.

38. ARK. CODE ANN. § 25-19-101-09 (West 2006).

39. *See, e.g.*, *Harris v. City of Fort Smith*, No. Civil 2002-975(V), 2006 WL 1174478 (Ark. May 4, 2006).

40. *Branzburg v. Hayes*, 408 U.S. 665, 689-90 (1972).

41. *Id.*

42. *Id.* at 709 (Powell, J., concurring).

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.<sup>43</sup>

He went on to say that the Court did not hold "that state and federal authorities are free to 'annex' the news media as 'an investigative arm of government.'"<sup>44</sup> His concurring opinion continued:

Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to the criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.<sup>45</sup>

In the opinion for three of the four dissenting justices, Justice Stewart proposed a three-part test to be applied when a reporter is asked to appear before a grand jury and reveal confidences.<sup>46</sup> Before the confidences could be revealed, Justice Stewart's test would require that the government (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law, (2) demonstrate that the information sought cannot be obtained by alternative means that are less destructive of First Amendment rights, and (3) demonstrate a compelling and overriding interest in the information.<sup>47</sup> That formulation has had a remarkable impact upon the development of the law defining the reporter's privilege and its contours. It has influenced the recognition of the privilege by a majority of federal courts of appeals<sup>48</sup> and the appellate courts

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43. *Id.*

44. *Id.* (quoting Justice Stewart's dissent).

45. *Id.* at 710.

46. *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).

47. *Id.*

48. See, e.g., *In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.

of at least nine states.<sup>49</sup> Other states adopting the privilege have used Justice Powell's concurring opinion for guidance.<sup>50</sup>

A noteworthy exception to the cases recognizing a qualified reporter's privilege pursuant to *Branzburg* is a breezy opinion by Judge Richard Posner for a panel of the Seventh Circuit in *McKevitt v. Pallasch*,<sup>51</sup> a case that was decided in 2003. The facts in *McKevitt* were beyond the traditional boundaries of *Branzburg*.<sup>52</sup> A defendant in a prosecution in Ireland sought an order from a United States district court requiring journalists in America to turn over to him tape recordings of non-confidential interviews that a primary witness for the prosecution had given to the journalists.<sup>53</sup> The journalists resisted the order out of concern that the defendant would be appropriating their intellectual property.<sup>54</sup> United States district courts are authorized to order production of non-privileged evidence for use in foreign courts.<sup>55</sup> The witness who gave the interviews had no objection to their disclosure.<sup>56</sup> The journalists claimed that the taped interviews were subject to a federal common law reporter's privilege.<sup>57</sup>

Despite the difference from the factual situation in *Branzburg*, the *McKevitt* panel seized the opportunity to take a position in the developing jurisprudence on the issue of a reporter's privilege. The court held that subpoenas duces tecum to reporters should be judged by what is reasonable in the circumstances, just as other subpoenas are judged,<sup>58</sup> and it criticized

1983), *cert. denied*, 464 U.S. 816 (1983); *Zerrilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972). *But cf. In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 n.8 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997).

49. *State v. Salsbury*, 924 P.2d 208 (Idaho 1996) (declining to use the Stewart test but stating that it would be applicable in certain cases); *N.H. v. Siel*, 444 A.2d 499 (N.H. 1992); *In re Letellier*, 578 A.2d 722 (Me. 1990); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1989); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 89 F.R.D. 489 (C.D. Cal. 1981); *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978), *cert. denied*, 436 U.S. 905 (1978); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 436 U.S. 905; *Morgan v. State*, 337 So. 2d 951 (Fla. 1976); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974).

50. *See, e.g., Salsbury*, 924 P.2d 208; *State ex rel. Nat'l Broad. Co. v. Ct. of Common Pleas*, 556 N.E.2d 1120 (Ohio 1990); *Ex parte Grothe*, 687 S.W.2d 736 (Tex. Crim. App. 1984). Many states have enacted shield statutes derived from Justice Stewart's test. William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 666 (2006).

51. 339 F.3d 530 (7th Cir. 2003).

52. *Id.* at 531.

53. *Id.*

54. *Id.* at 533-34.

55. 28 U.S.C. § 1782(a) (2006).

56. *McKevitt*, 339 F.3d at 532.

57. *Id.* at 531.

58. *Id.* at 533.

opinions from the First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits that recognized some form of a reporter's privilege.<sup>59</sup> The Seventh Circuit "do[es] not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist."<sup>60</sup> Recognizing the harm that blind enforcement of that doctrine could cause, the opinion quoted from the majority opinion in *Branzburg* that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."<sup>61</sup>

Because of its author's prominence and the subject's timeliness, the opinion in *McKevitt* has received more attention than is usually accorded to circuit court opinions at odds with what appears to be the weight of authority on a given issue.<sup>62</sup> Whether the opinion is sufficient to retard what appears to be a growing consensus in federal and state courts to recognize a qualified reporter's privilege—in most cases connected to the First Amendment with appropriate respect for the majority and concurring opinions and Stewart's dissenting opinion in *Branzburg*—remains to be seen.<sup>63</sup> What is clear is that Judge Posner's opinion has invigorated the debate.<sup>64</sup>

#### IV. CURRENT DEVELOPMENTS IN ARKANSAS

The Arkansas Supreme Court has not addressed the issue of a reporter's privilege since its decision in *Saxton* in 1978. Some Arkansas circuit courts, however, have recognized the privilege. In *State v. Echols*<sup>65</sup> in the Circuit Court of Craighead County, Arkansas, the defendant subpoenaed Creative Thinking International, Inc. and Home Box Office to acquire the

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59. *Id.* at 532.

60. *Id.* at 533.

61. *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (1972)).

62. Kara A. Lawson, *The Demise of the First Amendment-Based Reporter's Privilege: Why This Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235, 1252–54 (2005); Jaynie Randall, *Freeing Newsgathering from the Reporter's Privilege*, 114 YALE L.J. 1827 (2005); Erik W. Laursen, *Putting Journalists on Thin Ice: McKevitt v. Pallasch*, 73 CONN. L. REV. 293 (2004); Heather Stamp, *McKevitt v. Pallasch: How the Ghosts of the Branzburg Decision Are Haunting Journalists in the Seventh Circuit*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 363 (2004).

63. The Second Circuit did not even cite *McKevitt* in its opinion holding that the government was entitled to seize reporters' telephone records in a criminal investigation. The court applied *Branzburg* in recognizing a qualified reporter's privilege, but it declined to determine its precise contours in *The New York Times Co. v. Gonzales*, 459 F.3d 160, 163 (2d Cir. 2006). The First Circuit acknowledged the limitations that *McKevitt* would place upon *Branzburg* but held that cases in the First Circuit were "in principle somewhat more protective." *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

64. See, e.g., Jeffrey Toobin, *Name That Source*, THE NEW YORKER, Jan. 15, 2006, at 30.

65. No. CR 93-450A (Cir. Ct. of Craighead County, Ark. filed Mar. 11, 1994).



audio portion of an interview with a separate murder suspect, Charles Jason Baldwin.<sup>66</sup> The circuit court<sup>67</sup> entered an order declaring that the First Amendment creates a qualified privilege in favor of the press engaged in the news-gathering process.<sup>68</sup> The court found that the defendant had not sufficiently shown that the materials sought by the subpoena were relevant or that the information could not be obtained from alternative sources.<sup>69</sup> The circuit court granted the journalist's motion to quash.<sup>70</sup>

In December 1994, in the Pulaski County Circuit Court case *First Commercial Trust v. Aldridge*,<sup>71</sup> the defendant Aldridge served a subpoena on reporters at the *Arkansas Democrat-Gazette*, seeking information obtained in their news-gathering activities.<sup>72</sup> The Honorable Chris Piazza entered an order upholding the First Amendment creation of a qualified privilege in favor of the press, and he found that Aldridge failed to show that the requested information was not available through less-intrusive means.<sup>73</sup> The court quashed the subpoenas.<sup>74</sup> In *State v. Bernard*,<sup>75</sup> also in the Circuit Court of Pulaski County, Judge Piazza made the same findings and quashed a subpoena served on a reporter for the *Arkansas Democrat-Gazette*.<sup>76</sup> In all three of these Arkansas circuit court cases, the courts applied the three-part balancing test articulated in Justice Stewart's dissent in *Branzburg*, and the courts recognized the qualified privilege as existing under Article 2, Section 6 of the Arkansas Constitution as well as the First Amendment to the Constitution of the United States.

In a 1996 federal court case in Arkansas, American Broadcasting Companies, Inc.<sup>77</sup> sought to quash a grand jury subpoena seeking a full transcript and videotape of an interview conducted by ABC News of Susan McDougal, a figure in the Whitewater investigation conducted by Independent Counsel Kenneth Starr.<sup>78</sup> One of ABC's arguments in favor of quashing the subpoena was that the segments of the videotape that were not broadcast

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66. Order at 1, *State v. Echols*, No. CR 93-450A (Cir. Ct. of Craighead County, Ark. Mar. 11, 1994).

67. The Honorable C. David Burnett.

68. Order, *supra* note 66, at 1.

69. *Id.* at 2.

70. *Id.*

71. No. 94-3006 (Cir. Ct. of Pulaski County, Ark. filed Dec. 12, 1994).

72. See Order at 1, *First Commercial Trust v. Aldridge*, No. 94-3006 (Cir. Ct. of Pulaski County, Ark. Dec. 12, 1994).

73. *Id.* at 1-2.

74. *Id.* at 2.

75. No. 94-2133 (Cir. Ct. of Pulaski County, Ark. filed Feb. 21, 1995).

76. See Order at 1-2, *State v. Bernard*, No. 94-2133 (Cir. Ct. of Pulaski County, Ark. Feb. 21, 1995).

77. *In re Grand Jury Subpoena Am. Broad. Co.*, 947 F. Supp. 1314 (E.D. Ark. 1996).

78. *Id.* at 1316-17.

were protected from disclosure by the journalist's qualified privilege under the First Amendment.<sup>79</sup> Further, ABC argued that the segments should not be produced unless the Independent Counsel could demonstrate that (1) the information sought was highly relevant, (2) it was not reasonably available from other sources, and (3) the Independent Counsel had an overriding need for the information.<sup>80</sup>

The court denied the motion to quash.<sup>81</sup> The district judge, the Honorable Susan Webber Wright, acknowledged that a number of federal courts have recognized a journalist's privilege, requiring a three-part test, but noted that the majority of those cases were decided in a civil context, and she declined to apply the three-part test in a grand jury setting.<sup>82</sup> In doing so, however, the court went on to say that even if it were to adopt the test urged by ABC, the court would deny the motion.<sup>83</sup> The opinion then carefully considered and rejected ABC's arguments on each of the three parts of the test.<sup>84</sup>

In 2002, another federal case in Arkansas, *United States v. Hively*,<sup>85</sup> addressed the issue of a reporter's privilege in the context of a criminal trial. A reporter, and the newspaper for which she worked, moved to quash a subpoena that ordered the reporter to appear and testify in the defendant's case.<sup>86</sup> The court<sup>87</sup> noted that the information sought by the defendant was not confidential, that the testimony sought was narrowly focused, and that the reporter was not asked to turn over notes or other unpublished materials.<sup>88</sup> Pointedly limiting its ruling to the specific facts before it, and noting the absence of evidence that the information was sought in bad faith or for purposes of harassment, the court declined to recognize any constitutional privilege protecting non-confidential testimony from the reporter.<sup>89</sup>

As we have seen, the development of federal law in civil cases has generally favored recognition of a qualified reporter's privilege, but the status of the reporter's privilege is not as clear in the Eighth Circuit. A 1997 panel opinion of the United States Court of Appeals for the Eighth Circuit<sup>90</sup> has been cited for the proposition that the Eighth Circuit has not yet ruled on

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79. *Id.* at 1317.

80. *Id.*

81. *Id.* at 1322.

82. *Id.* at 1319.

83. *In re Grand Jury Subpoena Am. Broad. Co.*, 947 F. Supp. at 1320.

84. *Id.* at 1320–21.

85. 202 F. Supp. 2d 886 (E.D. Ark. 2002).

86. *Id.* at 887.

87. The Honorable James M. Moody.

88. *Hively*, 202 F. Supp. 2d at 888.

89. *Id.* at 892.

90. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997), cert. denied, 521 U.S. 1105 (1997). But cf. *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 n.9 (8th Cir. 1972).

the issue in a civil or criminal context,<sup>91</sup> yet this statement is not free from doubt. In *Cervantes v. Time, Inc.*,<sup>92</sup> a libel case, the court held that summary judgment was properly granted without requiring the media defendants, a magazine and its reporter, to reveal the identity of confidential sources for an article linking the plaintiff, the mayor of St. Louis, to organized crime.<sup>93</sup> The plaintiff wanted to depose the sources in order to challenge the veracity of the information supplied to the defendants.<sup>94</sup> The court acknowledged the majority decision in *Branzburg* that a journalist does not have a First Amendment privilege to refuse to answer proper questions in a grand jury's investigation of a crime.<sup>95</sup> The court also said that "[t]he [*Branzburg*] Court was not faced with and, therefore, did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense."<sup>96</sup>

*Cervantes* was cited by the Ninth Circuit as supporting its finding in *Shoen v. Shoen*<sup>97</sup> of a qualified privilege for news reporters under *Branzburg*.<sup>98</sup> The basis of the view that the application of *Branzburg* to criminal and civil cases is an open question in the Eighth Circuit is this statement in the 1997 opinion: "Although the Ninth Circuit in *Shoen* cited our opinion in *Cervantes* for support, we believe this question is an open one in this Circuit."<sup>99</sup> The reason for the qualification is understandable in view of the context of *Cervantes*, in which the court expressed doubt that the same rule should apply to criminal and civil cases. The issue may still be open in the Eighth Circuit, but it is not wide open. The reservation expressed in *Cervantes* regarding the application of the majority opinion in *Branzburg* to civil cases cannot and should not be disregarded lightly.

The first clear acknowledgement by a federal court in Arkansas of a First Amendment qualified reporter's privilege in civil cases occurred in 2004 in an opinion on a motion to quash a deposition subpoena for a columnist's testimony in *Richardson v. Sugg*.<sup>100</sup> The proposed findings and recommended disposition by United States Magistrate Judge John F. Forster, Jr., which were adopted with a minor change by District Judge William R. Wilson, Jr., contain the following paragraph after a detailed review of the state of the law:

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91. *Richardson v. Sugg*, 220 F.R.D. 343, 346 (E.D. Ark. 2004).

92. 464 F.2d 986 (8th Cir. 1972).

93. *Id.* at 994.

94. *Id.* at 991-92.

95. *Id.* at 993 n.9.

96. *Id.*

97. 5 F.3d 1280 (9th Cir. 1993).

98. *Id.* at 1292 n.5.

99. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997) (emphasis added).

100. 220 F.R.D. 343 (E.D. Ark. 2004).

The Magistrate Judge finds that this Court should recognize, in accordance with the weight of authority, a First Amendment qualified reporter's privilege in civil cases against compelled disclosure of the identity of the reporter's confidential sources and of information, both confidential and non[-]confidential, gathered by the reporter in the news-gathering process.<sup>101</sup>

The holding requires the application of the three-part test upon the assertion of the privilege, noting that in the case of non-confidential information, the claim of privilege can be overcome by a showing "that the materials at issue are of likely relevance to a significant issue in the case and are not reasonably obtainable from other available sources."<sup>102</sup> The holding also provides that a reporter subpoenaed for a deposition should "appear for the deposition and assert his privileges in response to specific questions and make at least a minimal *prima facie* showing as to why and how the privilege is being properly invoked."<sup>103</sup>

#### V. CONCLUSION

The Arkansas Supreme Court has yet to define the scope of the reporter's privilege. Guidance can be found in orders of lower courts in Arkansas that have addressed the issue and from the thoughtful consideration of the privilege in opinions of federal courts sitting in Arkansas, particularly *In re Grand Jury Subpoena ABC*, *Hively*, and *Richardson*. In the thirty-four years since the Court decided *Branzburg*, the state and federal judiciaries have developed a jurisprudence on the issue that is variously drawn from the majority opinion of Justice White, the concurring opinion of Justice Powell, and the dissenting opinion of Justice Stewart. The judges of state and federal courts found good sense and sound legal reasoning in all three of those opinions, and the reporter's privilege is recognized in most of the federal circuits and in most of the states. It is telling that many of the state legislatures that have adopted a reporter's shield statute since *Branzburg* have found guidance in Justice Stewart's dissenting opinion. It is unlikely that Judge Posner's opinion in *McKevitt* will result in the dismantling of the jurisprudence that has been developing for more than three decades. There is just too much history.

The overarching idea of freedom of the press should not be obscured by a concern that is miscast as granting journalists special privileges that ordinary citizens do not have. The point is that the news-gathering process should be appropriately protected so that the public can be informed in order

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101. *Id.* at 347.

102. *Id.* (quoting *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29 (2d Cir. 1999)).

103. *Id.*

to be better equipped for the daunting task of self-governance. At the end of the day, as one Supreme Court justice has reminded us in expressing this view, it is the right of the public, not the right of the media, that is paramount.<sup>104</sup>

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104. Justice David H. Souter dissenting in *Cowen v. Cowles Media Co.*, 501 U.S. 663, 678 (1991) (citing *CBS, Inc. v. F.C.C.*, 453 U.S. 367 (1981)).